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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 195

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., CHESTNUT FARMS-CHEVY CHASE DAIRY COMPANY, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The oral opinion of the District Court appears at page 21 of the record. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 25) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 17, 1949 (R. 29). This petition for certiorari was filed July 15, 1949. The jurisdiction of

this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTION PRESENTED

Whether a combination between a milk producers association, its officer, and seven distributors, to fix the price of milk sold by the distributors to consumers and by the association to the distributors, to suppress competition by other distributors, and otherwise to control the market for milk in their area, is exempted from the prohibitions of the Sherman Act by the provisions of the Capper-Volstead and Clayton Acts.

STATUTES INVOLVED

Section 3 of the Sherman Act, 26 Stat. 209 (15 U.S.C. 3), provides:

> Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be

punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

The Capper-Volstead Act of February 18, 1922, 42 Stat. 388 (7 U.S.C. 291, 292) and Section 6 of the Clayton Act of October 15, 1914, 38 Stat. 731 (15 U.S.C. 17) are set forth in the Appendix, *infra*, pp. 11-14.

STATEMENT

This case involves the validity of an indictment filed March 8, 1948, in the United States District Court for the District of Columbia charging a combination and conspiracy in restraint of trade, in violation of Section 3 of the Sherman Act (R. 6). Two of petitioners filed motions to dismiss, on the grounds that the indictment failed to state facts sufficient to constitute an offense, and was duplicitous (R. 18-20). The district court, in an oral opinion, held that the indictment was not duplicitous but that it should be dismissed for failure to state an offense (R. 21-22). The United States, interpreting the decision as based solely upon a construction of the Sherman Act, appealed directly to this Court under the Criminal Appeals Act, Title 18, United States Code, Sec. 3731 (R. 23). After this Court had granted petitioners' motion to remand the case to the Court of Appeals for the District of Columbia Circuit (335 U.S. 802, R. 24), that court reversed the judgment of dismissal and remanded

the case to the district court for further proceedings. (R. 29).

The defendants named in the indictment, the petitioners here, are the Maryland and Virginia Milk Producers Association, the membership of which consists of approximately 1500 Maryland and Virginia milk producers supplying approximately 80% of the milk sold to distributors in the Washington metropolitan area (R. 6, 10); the Secretary-Treasurer of this Association (R. 8); and seven corporations, milk distributors, which purchase milk and cream from producers and resell them and the products processed therefrom, to consumers and other purchasers in the Washington metropolitan area (R. 6-11). These distributors purchase and resell 86% of all milk supplied in this area (R. 10, 11).

The principal allegations of the indictment are: The petitioners have conspired to eliminate and suppress competition in the sale of milk to, and its purchase by, the petitioner distributors, and in its resale to consumers and other purchasers in the Washington metropolitan area (R. 12). This conspiracy has consisted of continuing agreement and concert of action among the petitioners, as follows. The distributors have agreed to purchase their entire requirements of milk from petitioner Association to the extent that it can supply their needs, and to buy no milk from producers who are not members of the Association (R. 12). The Association has agreed to supply the distributors so far

as possible, to charge each distributor identical prices for milk, and to refuse to supply milk to independent distributors except at higher prices (R. 13). Petitioners have agreed on a classification of milk based solely on the use to which the milk is to be put by the distributors, for purposes of establishing price levels for such milk irrespective of quality (R. 13). The petitioners have agreed to fix the prices at which the distributors will purchase milk from the Association (R. 13) and the prices at which the distributors will resell milk to consumers and others (R. 15). The petitioners have agreed that whenever the amount of milk available for sale by the Association exceeds the amount which the distributors can resell as fluid milk at the prices agreed upon, the distributors will remove the excess from the market by purchasing and converting it into products other than fluid milk, even though the distributors might thereby suffer financial loss (R. 15). The petitioners have agreed that the Association will prevent and eliminate competition in the sale of fluid milk from distributors who are not parties to the conspiracy, by inducing them not to cut prices, attempting to deprive price-cutters of adequate supplies of milk, interfering with the transportation of milk to them, furnishing milk to the petitioner distributors at reduced prices for use in taking away contract business from the price-cutters, and otherwise driving them out of business (R. 15-16).

The indictment further alleges that the con-

spiracy has had the intended effect; that petitioners have gained control of the production, sale, and distribution of approximately 80% of the milk consumed in the Washington metropolitan area; have fixed prices for the sale of fluid milk in that area, resulting in increased prices to consumers and other purchasers; have prevented the importation of fluid milk from other sources; have deprived non-members of the Association of the opportunity to sell milk to petitioner distributors; and have deprived independent distributors of the opportunity to purchase milk from members of the Association (R. 16-17).

ARGUMENT

1. The decision below is plainly correct.

The petitioners do not dispute that the concerted price fixing of fluid milk sold by the Association to the distributors and resold by the distributors to consumers and others, and the conspiracy to suppress competition in the Washington market by concerted price cutting, boycotts, and other means, constitute violations of the Sherman Act unless privileged by later legislation.

Petitioners place almost exclusive reliance upon the alleged immunizing effect of provisions of the Capper-Volstead Act granting to agricultural producers a limited exemption from the antitrust laws. But we submit that this contention is foreclosed by the decision in *United States* v. *Borden Company*, 308 U.S. 188, which ruled adversely on the identical issues raised here. There, as here, the principal

defendants were distributors of milk in a city marketing area and a cooperative association of milk producers from which these distributors purchased most of their milk. There, also, the defendants were charged with conspiring to restrain trade and fix prices in the sale of milk from producers to distributors and in the sale of milk by distributors to consumers and others, and with conspiring to eliminate the competition of independent distributors. This Court rejected the argument that the Capper-Volstead Act authorized these activities. It held (pp. 204-205) that that Act merely grants to agricultural producers the right to act collectively in marketing their product and that it "cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise."

The object of the Capper-Volstead Act "is to authorize the producers of agricultural products to form associations for the purpose of collectively * * * marketing their products * * * It is not [intended] to place these associations above the [Sherman Act] but to grant them the same immunity from prosecution that corporations * * * enjoy * * *" H. Rep. No. 24, 67th Cong., 1st Sess., pp. 1, 3. Petitioners have gone considerably beyond collective action by producers in the marketing of their milk. The producers' association, in addition to marketing collectively, has conspired with distributors controlling a major portion of the market to fix prices for fluid milk at every level of the marketing pro-

cess, including sales to consumers as well as from producers to distributors. In addition, they have conspired to suppress competition from other distributors and producers by concerted price cutting, interfering with transportation facilities, and other invalid means. Such action far exceeds the limited right of agricultural producers to combine with each other granted by the Capper-Volstead Act.

Petitioners attempt to distinguish the *Borden* case upon the ground that the indictment in that case named as defendants, in addition to the producers' association and the distributors, certain municipal officials, labor officials, and a labor union. But the holding in the *Borden* case does not turn on the number or character of the other parties with whom the producers had combined, but on the nature and scope of the conspiracy entered into between the producers and outside groups. And the terms of this conspiracy were substantially identical with that in the case at bar.

So far as there is a parallel in the exemption from the antitrust laws granted to labor unions by the Clayton Act, the decisions of this Court sustain the view that the exemption is limited to collective bargaining by the association for the initial sale of producers' milk and does not encompass combining and conspiring with distributors to fix prices for resale to the public and to bar all competitors from the area. In *Allen Bradley Company* v. *Local Union No. 3*, 325 U.S. 797, this Court held that the

collective bargaining privilege did not authorize labor unions to "aid non-labor groups to create business monopolies and to control the marketing of goods and service." (p. 808). "When the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions * * *" (p. 809). To the same effect is *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 400.

During the major portions of the period covered by the conspiracy charged in the instant case no marketing order issued by the Secretary of Agriculture under the Agriculture Marketing Agreement Act of 1937, 50 Stat. 246 (7 U.S.C. 601), was in effect in the Washington metropolitan area. The *Borden* case explicitly holds (pp. 196-203) that the provisions of the Marketing Agreement Act give no immunity from the Sherman Act in these circumstances.

2. The judgment of the Court of Appeals is not final, but merely reverses the district court's judgment sustaining petitioners' motion to dismiss the indictment and remands the case to that court for further proceedings. The general rule is that the writ of certiorari will not be issued to review a judgment or decree which is not final. *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U.S. 251, 258; *Hanover Milling Company* v. *Metcalf,* 240 U.S. 403, 408-409. Here there are persuasive reasons for adherence to the general rule. Aside from the

substantial delay in bringing petitioners to trial, the question sought to be raised by petitioners need not be determined at this stage of the litigation. The petitioners' principal contention is that their activities are all within the exemption from the Sherman Act provided for agricultural marketing cooperatives by the Capper-Volstead Act. It would appear that the limits of the exemption granted by the Capper-Volstead Act can be determined more accurately, and therefore more appropriately, upon the basis of a factual record setting forth the precise nature of petitioners' activities rather than defined in the abstract with reference to the necessarily generalized allegations of the indictment. *Kennedy* v. *Silas Mason Company,* 334 U.S. 249, 257; cf. *United States* v. *Petrillo,* 332 U.S. 1, 12.

In *American Medical Association* v. *United States,* 310 U.S. 644, this Court declined to grant certiorari to review a decision of the Court of Appeals for the District of Columbia which had reversed a judgment dismissing the indictment, even though some of the questions as to construction of the statute which the petition for certiorari had presented were deemed worthy of review by certiorari after trial of the cause. *American Medical Association* v. *United States,* 317 U.S. 519, 527-528.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1949.

APPENDIX

The Capper-Volstead Act of February 18, 1922, 42 Stat. 388, 7 U.S.C. 291, 292, is as follows:

> * * * That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein or,
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> And in any case to the following:
>
> Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

SEC. 2. That if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district

court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall

be binding upon such association, the officers, and members thereof.

Section 6 of the Clayton Act of October 15, 1914, 38 Stat. 731, 15 U.S.C. 17, is as follows:

> That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

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